



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

BJG

Docket No: 3740-00

21 July 2000

SSGT [REDACTED] USMC
[REDACTED]
[REDACTED]

Dear Staff Sergeant [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 20 July 2000. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the report of the Headquarters Marine Corps Performance Evaluation Review Board (PERB), dated 24 May 2000, a copy of which is attached. They also considered your counsel's rebuttal letter dated 10 July 2000 with enclosures.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish probable material error or injustice.

The absence from your service record of other supporting documentation concerning the nonjudicial punishment (NJP) cited in the contested fitness report did not convince the Board that this report should not have mentioned the NJP. They were unable to find that the NJP was unfair or unjust because the proceedings were conducted by means of a telephonic conference call, where you and the officer conducting the proceedings did not have face-to-face contact. They recognized that under such circumstances, the ability of the presiding officer to assess your demeanor and credibility would have been somewhat restricted. However, they found no absolute requirement that the officer conducting an NJP hearing and the subject of the proceedings be face-to-face. They were unable to find that you were not permitted to hear the testimony of the witness against you, nor could they find any requirement that you have face-to-face contact with this witness. They noted you provided no evidence that you objected at all to the manner in which the proceedings were conducted. Finally, they were unable to accept your assertion that "no punishment was ever imposed."

In view of the above, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosure

Copy to:

, Esq.



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3280 RUSSELL ROAD
QUANTICO, VIRGINIA 22134-5103

IN REPLY REFER TO:
1610
MMER/PERB
24 MAY 2000

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF STAFF
SERGEANT [REDACTED], [REDACTED] USMC

Ref: (a) SSgt. [REDACTED] DD Form 149 of 3 Mar 00
(b) MCO P1610.7D w/Ch 1-2

1. Per MCO 1610.11C, the Performance Evaluation Review Board, with three members present, met on 18 May 2000 to consider Staff Sergeant [REDACTED] petition contained in reference (a). Removal of the fitness report for the period 970101 to 970602 (TR) was requested. Reference (b) is the performance evaluation directive governing submission of the report.

2. The petitioner contends the report is in error since it references a nonjudicial punishment (NJP) that was not administered per law and regulation. Based on the administrative flaw, the petitioner argues the NJP never came into actual existence and that no punishment was ever imposed and no written record of the NJP exists. To support his appeal, the petitioner furnishes a copy of the fitness report at issue, his Master Brief Sheet, letters from the I&I Lubbock, TX and Assistant I&I Red Bank, NJ, Page 12 from his Service Record Book, and Legal Actions Remarks from the Marine Corps Total Force System (MCTFS).

3. In its proceedings, the PERB concluded that the report is both administratively correct and procedurally complete as written and filed. The following is offered as relevant:

a. The report at issue was rendered "adverse", not only because of the entries of "yes" in Items 17b (adverse) and 17c (disciplinary) but also because of the "below average" mark in Item 14g (judgment) and the comments in Section C recording the petitioner's receipt of "Battalion level office hours." The report was correctly referred to the petitioner for his acknowledgement (signature in Item 24) and the opportunity to append a statement of rebuttal. In opting to omit a statement in his own behalf, the petitioner passively concurred in the accuracy of the evaluation without presenting anything in mitigation. Had there been any question as to the imposition of NJP, it should have been surfaced at that time -- not almost three years after the fact.

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b. The focus of the petitioner's challenge is that the office hours (NJP) referenced in the report never occurred and the reporting of such was both inaccurate and unjust. The Board finds it inconceivable that a Staff Noncommissioned Officer, with approximately 13 years of service, would passively acknowledge that he had been the subject of an NJP that "never occurred."

c. The inferences made by the petitioner and his legal counsel that there is no evidence to document the NJP proceedings are inaccurate. The report at issue contains the signatures of two commissioned officers (Captain/Reporting Senior and Lieutenant Colonel/Reviewing Officer), both of whom made specific reference to this proceeding. The signed statement of the current Assistant Inspector-Instructor, obtained by the petitioner's counsel (enclosure (4) to reference (a)) provides amplifying details of the NJP proceeding referenced in the challenged report. This statement describes the geographical disparity between elements of this command and the efforts undertaken by the command in the execution of the NJP. As a matter of information, this Headquarters contacted the former I&I and the Battalion Sergeant Major concerning this issue. Both confirmed the NJP did, in fact, occur, and that the petitioner had been found guilty. Interestingly, the petitioner makes no effort to dispute the accuracy or validity of this statement. Rather, his sole focus is on the unavailability of corroborating paperwork.

d. Marine Corps directives are very specific in their provisions for records maintenance and custody. As evidenced by enclosure (4) to reference (a), these records were only required to be retained for a period of two years. The request by the petitioner/legal counsel for information was dated 6 December 1999 -- approximately 2 1/2 years after the reported proceedings.

e. Given the geographic disparity described with this command and the timing of events:

(1) The purported assault occurred in May 1997 (enclosure (4) to reference (a))

(2) NJP proceedings were subsequently convened

(3) The petitioner was transferred, effective 970602 (Item 3b of the challenged fitness report)

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A very plausible scenario for the lack of documentation is that the petitioner detached from his command, transferring with Service Record Book (SRB) in hand before the additional "paperwork" ever caught up to him. Curiously, the NAVMC 118-12 submitted as enclosure (5) to reference (a) is a Form Flow version of Mar 98 -- approved some 9-10 months after the disciplinary action taken. The actual Page 12 in the petitioner's SRB at the time he received NJP is not provided for review.

f. The Board concludes that the fitness report at issue constitutes a legitimate, objective portrayal of the petitioner's performance during the stated period. The preponderance of evidence, circumstantial as it may be, confirms that the NJP proceedings did, in fact, occur and were appropriately recorded.

4. The Board's opinion, based on deliberation and secret ballot vote, is that the contested fitness report should remain a part of Staff Sergeant [REDACTED]'s official military record.

5. The case is forwarded for final action.

[REDACTED]

Chairperson, Performance
Evaluation Review Board
Personnel Management Division
Manpower and Reserve Affairs
Department
By direction of the Commandant
of the Marine Corps